God, Jesus, Allah and Yahweh Should Be Government Employees: How Zelman v. Simmons-Harris Can Establish a Constitutional Framework for Government Funding of Faith-Based Services

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GOD, JESUS, ALLAH AND YAHWEH SHOULD BE GOVERNMENT EMPLOYEES: HOW ZELMAN v. SIMMONS-HARRIS CAN ESTABLISH A CONSTITUTIONAL FRAMEWORK FOR GOVERNMENT FUNDING OF FAITH-BASED SERVICES

I. INTRODUCTION

The Preamble of the U.S. Constitution identifies "promote the general Welfare" as one of the reasons for the establishment of the Constitution.¹ Thus, the U.S. government, within the limits established by the Constitution, should use its power and best efforts to ensure the health and prosperity of Americans. The government’s goal, however, should go beyond good intentions and achieve good, compassionate results.² Whether it was the programs of the New Deal that helped the downtrodden out of the Great Depression or the programs of the War on Poverty started in the 1960s, these governmental acts had great intentions and great results for their time period.³ Many of these programs still remain,  

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¹. U.S. Const. pmbl. ("We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

². See Foreword by President George W. Bush, at http://www.whitehouse.gov/news/reports/faithbased.html (last visited Nov. 10, 2003) ("The paramount goal must be compassionate results, not compassionate intentions. Federal policy should reject the failed formula of towering, distant bureaucracies that too often prize process over performance. We must be outcome-based, insisting on success and steering resources to the effective and to the inspired.").

³. See Alan Nevins & Henry Steele Commager, A POCKET HISTORY OF THE UNITED STATES 417-22 (9th ed. 1992) (summarizing Roosevelt's presidency and New Deal). President Franklin Roosevelt's New Deal encompassed legislation and programs that both helped the country get out of the Great Depression and reformed the government to protect the country's welfare in the future. See id. (describing effects of New Deal legislation). President Lyndon B. Johnson declared the War on Poverty in his 1964 State of the Union address. See Fred Greenbaum, War on Poverty, in GROLIER MULTIMEDIA ENCYCLOPEDIA, at http://gi.grolier.com/presidents/aae/side/waronp.html (last visited Nov. 10, 2003) (explaining historical background of War on Poverty). New programs such as VISTA (Volunteers in Service to America), Neighborhood Youth Corps, Job Corps, College Work Study, Head Start and Community Action Program were created. See id. (stating service programs). The Office of Economic Opportunity, run by Sargent Shriver, had full authority over these programs; however, due to funding of the Vietnam War, the Office of Economic Opportunity received inadequate funding. See id. (explaining how increased spending for Vietnam War cut into funding for War on Poverty).
as do the good intentions behind them, but an ever-growing cynicism about their productivity has surfaced.4

To achieve better results, the government has slowly reached out to faith-based social services and other community-based services to help revitalize the welfare system and the War on Poverty.5 The Welfare Reform Act of 1996 includes the Charitable Choice language, assuring religious social services that they can receive government funding without losing their religious character.6 Nevertheless, according to President Bush and his administration, burdens and biases still prevent smaller groups, both faith-based and secular, from receiving federal funding.7 In January 2001, 

4. See Martha Minow, Public Values in an Era of Privatization: Public and Private Partnerships: Accounting for the New Religion, 116 Harv. L. Rev. 1229, 1242 (2003) (noting perceptions of widespread failure). The welfare system was reformed in 1996 because of these negative perceptions of the government’s widespread failure. See id. (stating that perceptions led to reform). Echoing these same perceptions of the government’s failure, President Bush stated in his May 2001 commencement address at the University of Notre Dame that:

Lyndon Johnson advocated a War on Poverty that had noble intentions and some enduring successes. Poor families got basic health care; disadvantaged children were given a head start in life. Yet, there were also some consequences that no one wanted or intended. The welfare entitlement became an enemy of personal effort and responsibility, turning many recipients into dependents. The War on Poverty also turned too many citizens into bystanders, convinced that compassion had become the work of government alone.

George W. Bush, Remarks by the President in Commencement Address University of Notre Dame, Indiana (May 21, 2001) [hereinafter Notre Dame Commencement Address], at http://www.whitehouse.gov/news/releases/2001/05/print/20010521-1.html.

5. For a discussion of the government’s faith-based initiatives, see infra notes 63-72 and accompanying text.

6. The Charitable Choice language is codified at 42 U.S.C. § 604a (2003). Subsection (b) states:

The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2), on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program. 42 U.S.C. § 604a(b). Subsection (d) states that “[a] religious organization with a contract described in subsection (a)(1)(A), or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B), shall retain its independence from Federal, State, and local governments, including such organization’s control over the definition, development, practice, and expression of its religious beliefs.” Id. § 604a(d).

President Bush issued Executive Order 13199, creating the White House Office of Faith-Based and Community Initiatives. Its goal is to “enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law.”

Why do President Bush and many others believe that faith-based services and other community-based services can achieve better results for less fortunate Americans than can the federal government? One commentator posited that the current President “sees poverty as a status that can be overcome through hard work, love, and compassion.” According to this commentator, “religious institutions are better able to address the problems of the poor than government agencies.” This Note argues that the compassion espoused by faith-based services can do a good, if not better, job than the lethargic federal bureaucracy in leading the homeless, the addicted and other similarly situated individuals out of their conditions.

While the benefits of faith-based services seem hard to dispute, the constitutionality of funding these organizations has caused and will continue to cause heated debate. According to one scholar, “[f]ew issues are more divisive in American legal culture than government support of religion.” There is great debate on whether these groups should be funded by the government, but poverty, poor urban schools and other social ills still plague this country. This Note posits that faith-based services, such as soup kitchens or drug rehabilitation centers, provide the United States a much needed social service aimed at curing these ills.

Zelman v. Simmons-Harris, a U.S. Supreme Court case decided in 2002, provides a constitutional framework for government funding of

8. See Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001) (establishing Executive Department Centers for Faith-Based and Community Initiatives to “coordinate a national effort to expand opportunities for faith-based and other community organizations and to strengthen their capacity to better meet social needs in America’s communities”).

9. Id.


11. For a further discussion of the effectiveness of faith-based services, see infra notes 126-46 and accompanying text.


13. Id. Cole describes the divide over the issue of government funding of religion through school vouchers or through faith-based services as reflective of a deeper divide in American culture. Our country is split “between those who believe that religion already plays too dominant a role in public life, and those who believe that religion has been improperly banished from the public square.” Id. at 561.

faith-based services.\textsuperscript{15} In \textit{Zelman}, the Supreme Court concluded that Ohio's Pilot Project Scholarship Program did not offend the Establishment Clause of the Constitution.\textsuperscript{16} The program gives parents of children in Cleveland public schools, one of the worst performing public school systems in the nation, the option of receiving a tuition aid voucher for a participating private religious or secular school.\textsuperscript{17} The program also provides tutorial aid for children who remain in the public schools.\textsuperscript{18} The majority reasoned that the program did not violate the Establishment Clause for two reasons: (1) the program had a valid secular purpose of providing educational assistance to poor children in a failing school district, and (2) the program did not have the effect of advancing or inhibiting a religion because the aid was given to the parents who had a true private choice in deciding whether to send their children to a religious school.\textsuperscript{19} Thus, \textit{Zelman} symbolizes the concept of true, genuine and independent private choice and demonstrates how, when the beneficiary of government-funded religious entities has this choice, there is no violation of the Establishment Clause.\textsuperscript{20}

This Note proposes that the \textit{Zelman} decision reflects the Supreme Court's trend away from separationism and establishes a possible framework for other government funding of religious institutions, including

\begin{itemize}
\item 15. See Paul Salamanca, \textit{Choice and Market-Based Separationism}, 50 Buff. L. Rev. 931, 931-32 (2002) ("The Supreme Court's recent decision in \textit{Zelman} v. Simmons-Harris appears to clear the way for a wide variety of educational and charitable choice plans. \ldots If taken to its logical limits, the rule of law announced in \textit{Zelman} appears competent to sustain any of a number of public programs in which the government joins with private organizations, both secular and non-secular, to provide secular services.").
\item 16. See \textit{Zelman}, 536 U.S. at 643-44 (holding that Ohio's school voucher program does not offend Establishment Clause).
\item 17. See id. at 645 (stating that any private school, religious or secular, could participate in program as long as it met certain statewide educational standards). Public schools in the surrounding towns of Cleveland were also eligible to participate. See id. (explaining possible public school participation). Nevertheless, none of the public schools were participating at the time this case was decided. See id. at 647 (noting lack of participation by public schools).
\item 18. See id. at 645-46 (explaining other part of Ohio Pilot Project Scholarship Program). The tutorial aid portion of the program is not relevant to the Establishment Clause issue at hand. Parents simply arrange for their children to meet with registered tutors and then submit the bills to the state. See id. at 646 (discussing procedures for receiving tutorial aid benefit). For the tutorial aid, students from low-income families receive 90\%, up to $360, while all other families receive 75\% of that amount. See id. (explaining how funding is disbursed). The number of tutorial aid grants in a school district must equal the number of tuition aid scholarships provided in that same district. See id. at 646-47 (stating institutional requirement for program).
\item 19. See id. at 648-49 (holding that program's purpose was indisputably secular, and forbidden effect was not established when individuals freely directed aid to religious schools or institutions).
\item 20. See id. ("The key to these new relationships, the Court held, is the concept of 'true,' 'genuine,' and 'independent' private choice to partake of services offered by religious entities.").
\end{itemize}
faith-based services. Part III.A. of this Note explains how Zelman represents the Supreme Court’s trend of moving Establishment Clause jurisprudence further away from strict separationism. Part III.B. advocates that where there is a voucher system for social service recipients who have a true private choice between providers (both religious and secular), government funding of faith-based services is within the constitutional framework of Zelman. Part III.B. also demonstrates how direct government funding of these services can actually be considered indirect aid if vouchers are used. Part III.C. analyzes criticism of whether the requirement of true private choice has actually been satisfied in these types of funding. Lastly, Part III.D. discusses the effectiveness and the pragmatic benefits of more intense government funding of faith-based services.

II. BACKGROUND

A. Overview of Zelman v. Simmons-Harris

In 1996, because of Cleveland’s failing public schools, Ohio started its Pilot Project Scholarship Program. The program provides tuition aid for students to attend a participating public or private school of their parents’ choosing and also provides tutorial aid for students remaining in the public schools. Families with incomes two hundred percent below the poverty line are given priority. Eighty-two percent of the participating

21. See Ira C. Lupu & Robert W. Tuttle, Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles, 78 NOTRE DAME L. REV. 917, 919 (2003) (“Zelman represents the most recent and dramatic move away from Separationism. By holding in no uncertain terms that the Cleveland school voucher program satisfies constitutional requirements, the Supreme Court has opened the door for a wide range of relationships, once thought impermissible, between government and religious institutions.”).

22. See infra notes 73-84 and accompanying text.

23. See infra notes 85-99 and accompanying text.

24. See infra notes 100-13 and accompanying text.

25. See infra notes 114-25 and accompanying text.

26. See infra notes 126-46 and accompanying text.

27. See Zelman v. Simmons-Harris, 536 U.S. 639, 644-45 (2002) (citing OHIO REV. CODE ANN. § 3313.975(A) (Anderson 2000)) (“The program provides financial assistance to families in any Ohio school district that is or has been ‘under federal court order requiring supervision and operational management of the district by the state superintendent.’ Cleveland is the only Ohio school district to fall within that category.”).

28. See id. at 645 (“The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent’s choosing. Second, the program provides tutorial aid for students who choose to remain enrolled in public school.”) (citations to statutes omitted).

29. See id. at 646 (stating program’s priority for families well below poverty line). The setup of the program is as follows: Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250. For these
schools are religious and, so far, ninety-six percent of the students have chosen to attend the religious schools. None of the public schools in the neighboring towns agreed to participate in the school voucher program. The Pilot Project Scholarship Program was actually part of a broader initiative to improve the educational options for Cleveland school children so they can receive a better education. Community schools and magnet schools were also opened during this time. A group of Ohio taxpayers challenged the school voucher program in state court on state and federal grounds during the same year it was enacted. After various procedural steps, Zelman v. Simmons-Harris found its way to the U.S. Supreme Court.

lowest-income families, participating private schools may not charge a parental co-payment greater than $250. For all other families, the program pays 75% of tuition costs, up to $1,875, with no co-payment cap. These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate. 

Id. (internal citations omitted).
30. See id. at 647 ("In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. . . . More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line.").
31. See id. (acknowledging that none of public schools in districts adjacent to Cleveland elected to participate).
32. See id. (explaining different types of alternative education programs in Cleveland). Cleveland public schools have been labeled one of the worst performing public school systems in the country. See id. at 644 (stating deplorable state of Cleveland public schools). In 1995, when a federal district court put the district under state control, that court declared the district a "crisis of magnitude." Id. The situation was so poor that only one out of ten ninth graders could pass a basic proficiency examination. See id. (showing that only few students could pass proficiency exam). Two-thirds of the high school students dropped out or failed out prior to graduation, and of those students who made it to their senior year, one out of every four still failed to graduate. See id. (discussing graduation rate). Furthermore, of those who did graduate, few could read, write or compute at the same level as high school graduates in other cities. See id. (explaining low levels of proficiency for high school graduates of Cleveland schools).
33. See id. at 647 (stating that Pilot Project Scholarship Program was part of broader initiative that included community and magnet schools).
34. See id. at 648 (noting opposition to school voucher program). Teachers' unions and People for the American Way led the voucher opposition. See Lupu & Tuttle, supra note 21, at 921 (describing opposition to voucher program).
35. See Zelman, 536 U.S. at 648 (detailing procedural posture of case). The Ohio Supreme Court rejected the federal claim, but found a violation of the state constitution, which led the Ohio legislature to quickly correct the violation to keep the program alive. See id. ("The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution. The state legislature immediately cured this defect, leaving the basic provisions discussed above intact."). Therefore, in 1999, the voucher opponents filed an action in the U.S. district court seeking to enjoin the reenacted program as a violation of the Establishment Clause. See id. (indicating steps taken in federal district court). The district court granted sum-
A majority of the Court decided that Ohio’s school voucher program did not violate the Establishment Clause because the program had the valid secular purpose of providing educational assistance to disadvantaged children and because it did not have the effect of advancing or inhibiting religion. Specifically, the Court stated, “The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion.”

While the majority summarily decided that there was no dispute over the valid secular purpose of Ohio’s program, it did thoroughly explain why the program did not have the forbidden effect of advancing or inhibiting religion. In answering the “effect” question, the Supreme Court first considered whether this program was direct aid or indirect aid involving genuine and independent choice made by private individuals. In contrast to programs that provide direct aid to religious schools, this program was one of “true private choice, in which government aid reached religious schools only as a result of the genuine and independent choices of private individuals.” In Mueller v. Allen, Witters v. Washington Department of Services for the Blind and Zobrest v. Catalina Foothills School District, the Court addressed Establishment Clause challenges to neutral government programs that provided aid to individuals who then directed it to religious schools as a result of their own independent, private choice. In each of these cases, the Court rejected the Establishment Clause challenge.

Relying on these cases, the Court likewise rejected the Establishment Clause challenge in Zelman. The majority concluded that Ohio’s program embodied the principle of true private choice and thus mirrored the majority judgment for the Ohio taxpayers and the court of appeals affirmed that decision. See id. (overviewing procedure in lower courts). The U.S. Supreme Court granted certiorari and reversed the decision of the court of appeals. See id. (describing procedural steps leading to Supreme Court).

36. See id. at 648-49 (holding that there is no violation of Establishment Clause).

37. Id.

38. See id. at 649 (“There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system.”).

39. See id. (stating that answer depends on distinction between direct aid and indirect aid).

40. Id.


42. 474 U.S. 481 (1986).


44. See Zelman, 536 U.S. at 649-52 (describing analysis used in these three cases to reject similar Establishment Clause challenges).

45. See id. at 649 (“Three times we have rejected such challenges.”).

46. See id. at 652 (stating that Mueller, Witters and Zobrest establish basis for no violation of Establishment Clause in Zelman).
First, the program permitted all private schools, both religious and secular, within the school district to participate and also permitted adjacent public schools to participate without giving any type of preference or incentive to one type of school. Second, the ability of the parents to make a true private choice was not diminished by the fact that most of the participating schools were religious schools. Choice must be analyzed by evaluating all options to Cleveland school children; therefore, the school voucher was just one program in addition to the magnet school or community school option. Lastly, Justice Rehnquist wrote that private choice of individuals is a critical factor for determining the constitutionality of government-funding programs:

[T]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organi-

47. See id. at 655 ("We believe that the program challenged here is a program of true private choice, consistent with Mueller, Witters, and Zobrest, and thus constitutional.").

48. See id. (indicating that all schools within district, along with adjacent public schools, can participate). There is no preference to which private schools within the district may participate. The only preference in the program is toward giving the aid to low-income families. See id. (noting only low-income families receive preference). There are no financial incentives to skew the program to religious schools, but rather there are disincentives for them because private schools only receive one-half the government assistance given to community schools, one-third the assistance given to magnet schools and adjacent public schools (if they decided to participate) are eligible to receive two to three times the state funding of a private school. See id. at 653-54 ("The program here in fact creates financial disincentives for religious schools . . . ."). In addition, parents would not have to pay anything if they sent their children to a magnet or community school, but would have to pay the difference of the private school's tuition. See id. at 654 (discussing costs to parents for choosing to send children to religious private school through program and lack of costs for sending children to community or magnet school). This may dissuade some parents, who want some type of alternative to the public schools, from choosing the private school option. See id. ("Families too have a financial disincentive to choose a private religious school over other schools.").

49. See id. at 658 (stating that constitutionality of neutral aid program does not simply turn on whether and why most private schools are run by religious organizations or most recipients choose to use voucher at religious school).

50. See id. at 655-56 ("The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating all options Ohio provides Cleveland school children, only one of which is to obtain a program scholarship and then choose a religious school."). Justice O'Connor emphasizes this rationale in her concurrence by stating that while 82% of the participating schools are religious and 96% of the participating students are in religious schools, when you add in the students who attend community schools, the percentage of students in religious schools falls to 62.1%. See id. at 663-64 (O'Connor, J., concurring) (explaining how percentages change when community school option is included). Moreover, when you add the percentage of students in magnet schools to that number, the percentage of students in religious schools falls to 16.5%. See id. (explaining how percentage of religious schools drops when all options are considered).

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zations, or most recipients choose to use the aid at a religious school. As we said in Mueller, "such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." 51

Thus, Ohio's Pilot Project Scholarship Program is constitutional and stands as a framework for government programs that involve funding of religious organizations where true private choice is in the hands of the program's beneficiaries.

B. Government Funding of Religion

Government funding of religious entities is neither particular to religious schools nor a recent or occasional phenomenon. 52 As one commentator stated, "[t]he reality is that the divide between the public and private sectors has never been a clean line." 53 Religiously affiliated hospitals and child welfare and social services have received government funding for decades through entitlement programs structured as insurance or vouchers. 54 These religious institutions usually operate as nonprofit organiza-

51. Id. at 658. Chief Justice Rehnquist went on to explain how the numbers have fluctuated from year to year. For the school year 1999-2000, 96% of the scholarship recipients attended religious schools; however, in the 1997-1998 school year, only 78% of them attended religious schools. See id. at 659 (showing disparity between percentages for two different school years). This drastic increase is due to the fact that two private nonreligious schools participating in the program that had enrolled 15% of the recipients decided to register as community schools for the 1999-2000 school year. See id. (explaining why increase occurred). Chief Justice Rehnquist concluded that since "[m]any of the students enrolled in these schools as scholarship students remained enrolled as community school students," it would be considered arbitrary to count "one type of school but not the other to assess primary effect." Id. at 659-60. Therefore, it makes perfect sense to include all alternative educational choices in Cleveland when analyzing the issue of true private choice.

52. See Minow, supra note 4, at 1239 ("Nor is it new to see religious organizations in the business of schooling and social welfare.").

53. Diller, supra note 10, at 1743.

54. See Minow, supra note 4, at 1239 (explaining that this phenomenon was due to social conventions and constitutional interpretations). Justice O'Connor in her concurrence remarks that religious hospitals account for 18% of all hospital beds nationwide and rely on Medicare funds for 36% of their revenue. See Zelman, 536 U.S. at 667 (O'Connor, J., concurring) (discussing government funding of health services provided by religious entities). It is worth noting that religion has long played a part in the administration of health services from the early days of alms houses to current drug and alcohol treatment programs like Alcoholics Anonymous. See Judith B. Goodman, Note and Comment, Charitable Choice: The Ramifications of Government Funding for Faith-Based Health Care Services, 26 NOVA L. REV. 563, 586 (2002) (describing religion's role in health services).
tions separate from their religion’s place of worship, thus observers may not even realize the religious connection.\(^5\)

In Justice O’Connor’s concurrence in *Zelman*, she mentioned a lengthy list of government benefits going to religious organizations.\(^5\) She stated that “[a]gainst this background, the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs.”\(^5\) Her list focused on tax policies and funding through public health, social service and educational programs.\(^5\) With respect to tax policies, religious organizations may qualify for exemptions from federal and state corporate income tax and property tax in all fifty states.\(^5\)

In addition, clergy may qualify for federal tax breaks on income used for housing, and lay individuals, corporations, trusts and estates may receive a tax deduction for charitable contributions to religious groups.\(^5\) Thus, these tax policies definitely confer a benefit on religious organizations.\(^5\) As to other government funding, religious institutions receive aid through public health programs like Medicare and Medicaid, through educational programs like Pell Grants and the GI Bill and through childcare programs such as the Child Care and Development Block Grant Pro-

\(^5\)See Minow, *supra* note 4, at 1239 (explaining that observers do not realize religious affiliation of many nonprofit agencies, but staff and volunteers are often acting out of religious conviction).

\(^5\)See Zelman, 536 U.S. at 665-68 (O’Connor, J., concurring) (listing various government funding provided to religious institutions). These benefits include exemptions from federal corporate income tax and tax deductions for charitable contributions to qualified religious groups, to name a few. *See id.* (delineating examples of government benefits).

\(^5\)Id. at 668. Justice O’Connor, however, qualifies this statement by saying that this alone does not justify the school voucher program under the Establishment Clause, but rather places the “alarmist claims” against the program in a broader perspective. *Id.*

\(^5\)For a further discussion of government benefits that go to religious organizations, see *infra* notes 59-62 and accompanying text.

\(^5\)See Zelman, 536 U.S. at 665 (O’Connor, J., concurring) (discussing state and federal tax exemptions for religious organizations).

\(^5\)See *id.* (explaining other tax considerations for religion). Note that tax deductions for charitable contributions reduce the federal tax revenue by $25 billion annually and over 60% of household charitable contributions go to religious charities. *See id.* at 666 (stating effect of tax deductions on tax revenue and prevalence of these deductions).

\(^5\)See *id.* at 665-66 (stating that tax policies confer significant benefit on religious institutions). Justice O’Connor supports her statement by showing that:

The state property tax exemptions for religious institutions alone amount to very large sums annually. For example, available data suggests that Colorado’s exemption lowers that State’s tax revenues by more than $40 million annually; Marylan’s exemption lowers revenues by more than $60 million; Wisconsin’s exemption lowers revenues by approximately $122 million; and Louisiana’s exemption, looking just at the city of New Orleans, lowers revenues by over $36 million. *Id.* (internal citations omitted).
gram. This list portrays the extensive connection between government support of religious organizations and religious organizations' value to our country.

C. Charitable Choice and Bush's Faith-Based Service Initiatives

The Charitable Choice concept of welfare reform paves the way for the Bush Administration's faith-based service initiatives. According to the White House, Charitable Choice's purpose is "to remedy overly restrictive rules and confusion about the constitutional requirements for Government collaboration with faith-based providers." This purpose is achieved through a statutory vehicle—42 U.S.C. § 604a:

The purpose of this section [604a] is to allow states to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded . . . .

Faith-based social service providers have always provided these services to our society, and because of Charitable Choice, these organizations can now benefit from the government's desires to privatize and to find a better way to care for people.66

62. See id. at 666-67 (exemplifying more types of government funding of religious entities). Justice O'Connor emphasizes that all of "[t]hese programs are well-established parts of our social welfare system." Id. at 667.

63. See Bruce Murray, Mixing Government and Religion, at http://www.facsnet.org/issues/faith/nathan.php (last visited Nov. 4, 2003) ("Former President Bill Clinton coined the phrase, 'ending welfare as we know it,' which has a subtext based in morals and values; and Clinton signed into law Charitable Choice legislation, which paved the way for President Bush's Faith-Based and Community Initiatives.").

64. White House Release, supra note 7, at Barriers to Faith-Based Organizations Seeking Federal Support. To accomplish this purpose, "Charitable Choice attacks the anti-religious bias that pervades too many statutes, regulations, and practices, ensures that groups use Government funds for public purposes, and provides a clear set of guidelines to discipline and structure these needed collaborations." Id. at 17.


66. See Minow, supra note 4, at 1240 (noting benefits of privatization). Minow explains that:

At the turn of the twenty-first century, the increasing use of private organizations to achieve public ends reflects a number of trends: disillusionment with government programs, faith in competition and consumer choice, politicians' desire to claim to have diminished government when in fact they have merely outsourced it, and strategic pressure for privatization by lobbying groups. Religious providers continue educational or social-service activities they started years before but now benefit from the government's desire for private partners, subcontractors, or replacements.
President Bush's faith-based service initiatives were enacted to ensure that the Charitable Choice legislation is actually used and actually produces benefits for faith-based services and for the people they help.67 The Bush Administration found that (1) faith-based and community services receive little federal financial support compared to the size and scope of the good they provide, (2) they experience widespread bias and burdensome regulations and (3) federal administrators have done little to help or require states and local governments to be more receptive to the new rules for faith-based services.68 In response, Bush established a White House Office of Faith-Based and Community Initiatives to help bolster the ability of the government to fund faith-based and community services.69

The Bush Administration's belief that faith-based and community services are an appropriate way for the government to promote our general welfare is based on the principle that "private administration of social programs is inherently superior to government administration."70 The rhetoric, however, is not a reflection of privatization as a better management theory; rather, the rhetoric invokes the language of the War on Poverty.71 Bush's belief in the power of faith and compassion is the driving force behind his attempt at reviving the failing War on Poverty through his faith-based service initiatives.72

Id.; see also Murray, supra note 63 (quoting Richard Nathan). Nathan stated that "[t]he idea is that government bureaucracies can't care for people the way faith-based groups can." Id. Nathan is the director of the Nelson A. Rockefeller Institute of Government and director of The Roundtable on Religion and Social Welfare Policy. See id. (identifying Nathan's experience with politics and religion).

67. See Bush, supra note 2 (stating need to utilize Charitable Choice legislation to make federal programs more friendly to faith-based services).

68. See White House Release, supra note 7, at Introduction (listing findings of report by Centers for Faith-Based and Community Initiatives).


70. Diller, supra note 10, at 1757 (noting principle underlying privatization of social programs).

71. See id. at 1757-58 (explaining that Bush does not present faith-based service initiatives as simply better management theory). "[Bush's] rhetoric draws heavily on the language of community empowerment development by supporters of the War on Poverty." Id. at 1758. An example of this War on Poverty rhetoric was in President Bush's remarks at the 2001 University of Notre Dame commencement address:

When poverty is considered hopeless, America is condemned to permanent social division, becoming a nation of caste and class, divided by fences and gates and guards. Our task is clear, and it's difficult: we must build our country's unity by extending our country's blessings. We make that commitment because we are Americans. Aspiration is the essence of our country. We believe in social mobility, not social Darwinism. We are the country of the second chance, where failure is never final. And that dream has sometimes been deferred. It must never be abandoned.

Notre Dame Commencement Address, supra note 4.

72. See Diller, supra note 10, at 1761 ("The president's goal is to uplift individual people 'who hurt' through love and compassion. For him, the power of faith is a means of achieving this uplift."). Bush's belief in the power of faith and compas-
III. ANALYSIS

A. Two Schools of Thought About the Establishment Clause

Any intersection between religion and government rallies two opposing Establishment Clause schools of thought to the controversy. On one side of the issue are separationists, who are suspicious of any government aid to religion, and on the other side are the assimilationists, who argue that religious organizations should have the same access to government funding as secular organizations.73 The separationists view any government subsidy of religion as a violation of the Establishment Clause, while the assimilationists view all aid to religious activity as constitutional, so long as there is a secular purpose and both religious and secular recipients are treated equally.74 This ideological divide goes beyond interpretations of the Constitution and “reflects a deeper divide in American culture, between those who believe that religion already plays too dominant a role in

section to “uplift” is shown through his words at the 2001 University of Notre Dame commencement:

We are committed to compassion for practical reasons. When men and women are lost to themselves, they are also lost to our nation. When millions are hopeless, all of us are diminished by the loss of their gifts. And we’re committed to compassion for moral reasons. Jewish prophets and Catholic teaching both speak of God’s special concern for the poor. This is perhaps the most radical teaching of faith—that the value of life is not contingent on wealth or strength or skill. That value is a reflection of God’s image. Much of today’s poverty has more to do with troubled lives than a troubled economy. And often when a life is broken, it can only be restored by another caring, concerned human being. The answer for an abandoned child is not a job requirement—it is the loving presence of a mentor. The answer to addiction is not a demand for self-sufficiency—it is personal support on the hard road to recovery.

Notre Dame Commencement Address, supra note 4.

73. See Cole, supra note 12, at 559 (defining sharp divide between separationists and assimilationists).

74. See id. at 561 (describing divide over role of religion in American culture).

“To separationists, virtually any state subsidy of religious activity offends the Establishment Clause. To assimilationists, virtually all aid to religious activity is permissible, so long as the funding serves a secular purpose and is distributed pursuant to criteria that treat religious and secular recipients equally.” Id. Underlying these contrasting theories is the separationist belief that religion should be treated distinctively and the opposing belief of neutrality in which religion is no different from other theories, philosophies or motivations. See Steven K. Green, Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism, 43 B.C. L. Rev. 1111, 1126 (2002) (stating underlying theories of separationism and underlying theories in favor of neutrality). The cultural divide, in John J. Dilulio’s terms, is between the “orthodox secularists” and “orthodox sectarians.” John J. Dilulio, Jr., Compassion in Truth and Action: What Washington Can Not Do to Help, in SACRED PLACES, CIVIC PURPOSES 284 (E. J. Dionne Jr. & Ming Hsu Chen eds., 2001) (describing cultural divide). The orthodox secularists, usually on the political left, pay lip service to the actual good done by faith-based services while insisting that the government only support programs that are nominally religious or entirely secular, while the orthodox sectarians want faith-based services to expressly serve religious purposes. See id. at 284-85 (describing polarized views of these two groups).
public life, and those who believe that religion has been improperly ban-
ished from the public square.’’ 75

In Zelman, the U.S. Supreme Court faced the collision of separationist
and assimilationist viewpoints due to their presence in our Establishment
Clause jurisprudence. 76 Not only is the legal and cultural divide on gov-

75. Cole, supra note 12, at 561 (describing divide in American culture). Cole
continues to describe this divide: “Like so many difficult public policy issues, this
issue tends to polarize the public, legal scholars, and judges.” Id.

76. See Lupu & Tuttle, supra note 21, at 922 (stating that intersection between
these two distinct lines of jurisprudence might be called “collision”). Prior to the
1940s, there were few Supreme Court decisions pertaining to the Establishment
Clause. See Ira Lupu & Robert Tuttle, Government Partnerships with Faith-
Based Service Providers 16 (2002) [hereinafter Government Partnerships],
available at http://www.religionandsocialpolicy.org/docs/legal/reports/12-4-
2002_state_of_the_Law.pdf (last visited Nov. 6, 2003). In 1947, the Supreme Court
began its involvement in policing the boundaries for government funding of relig-
ious institutions. See id. (describing increasing Supreme Court involvement in de-
ciding religious institution cases). In that year, the Court upheld a reimbursement
program for families to pay the cost of public transportation to both public and
private schools. See Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (holding that
reimbursement program that paid for transportation by public carrier to benefit
children of public and private schools was not unconstitutional). Nevertheless, the
Court announced a strong separationist philosophy. See id. at 16 (stating that while
states cannot contribute tax-raised funds to support institutions that teach particu-
lar faith, states are permitted to extend state law benefits to all citizens regardless
of their religious beliefs). The decision was five to four with the four dissenters
taking an even stronger separationist approach. See id. at 31-32 (Rutledge, J., dis-
senting) (“[The purpose of the Establishment Clause] was to create a complete
and permanent separation of the spheres of religious activity and civil authority by
comprehensively forbidding every form of public aid or support for religion.”); see
also Government Partnerships, supra, at 16 (indicating dissent’s use of stronger
separationist principles). Because the principal beneficiaries of the program in-
volved in Everson were Catholic schools, some scholars argue that anti-Catholic sen-
timent caused much of the separationist approach. See id. at 16-17 (questioning
whether anti-Catholic bias is root of separationist approach in Everson). This sepa-
ratist theme carried on for the next thirty years. See id. at 17 (stating continua-
tion of separationism for thirty years after Everson). In the 1970s, separationism
reached its “height of influence.” See Salamanca, supra note 15, at 968 (describing
history of separationism in Establishment Clause jurisprudence). In 1971, the
Court in Lemon v. Kurtzman developed the contemporary test for determining
whether a government action violates the Establishment Clause. See 403 U.S. 602,
612-13 (1971) (considering criteria developed by past precedent to develop three-
part test); see also Alexis Peters, Note and Comment, The Office of Faith-Based and
Community Initiatives: Why the Establishment Clause Prevents Religious and Public Social
Service Providers from Competing on a “Level Playing Field”, 23 WHITTIER L. REV. 1173,
1181 (2002) (“Lemon is eminent for providing the contemporary test for whether a
governmental action violates the Establishment Clause.”). The Lemon Test has
three prongs: (1) the governmental action must have a secular purpose; (2) the
primary effect must neither advance nor inhibit religion; and (3) the action “must
‘not foster’ an excessive government entanglement with religion.” Lemon, 403 U.S.
at 612-13 (quoting Walz v. Tax Comm’n, 397 U.S. 664, 674 (1970)). This test “mem-
orialized the separationist standard.” Green, supra note 74, at 1120. Beginning
in the early 1980s, the separationism school of thought started to recede and was
trumped by principles of neutrality. See Government Partnerships, supra, at 19
(discussing change in this area of constitutional law). Neutrality essentially be-
government funding of religion evident in Supreme Court case law, but it is also evident among the Supreme Court justices. The Zelman decision

believes in the “evenhanded treatment” of religious institutions under the law. See Green, supra note 74, at 1114 (describing theory underlying neutrality). Some cases used neutrality as a way of upholding government funding of faith-based services. See Witters v. Wash. Dep’t of Servs. for the Blind, 474 U.S. 481, 488-89 (1986) (holding that Washington may grant vocational training funds to disabled student attending religious institution without violating Establishment Clause); Mueller v. Allen, 463 U.S. 388, 390-91 (1983) (holding that tax deduction for educational expenses that primarily benefited parents of children attending sectarian schools did not violate Establishment Clause); see also Government Partnerships, supra, at 19 (discussing neutrality as rising Establishment Clause theory). In addition to emphasizing religious neutrality, both the Mueller and Witters cases emphasized the intervening role of beneficiary choice. See id. (stating emphasis on choice in these cases). While this period did not dramatically change the law from the separationist days, with respect to direct fundings, several significant cases were on the horizon. See id. at 20 (stating that there was no change in approach for direct funding cases but important cases were to come). In 1985, the Court held that public employees were not allowed to teach in parochial schools. See Aguilar v. Felton, 473 U.S. 402, 414 (1985) (holding that state program that funds instructors to teach in underprivileged schools violated Constitution), overruled by Agostini v. Felton, 521 U.S. 203, 208-09 (1997). Then in 1997, the Court overruled Aguilar, holding that public employees were allowed to teach remedial reading and arithmetic in religious schools. See Agostini, 521 U.S. at 208-09 (holding that public school teachers providing remedial education in private religious schools does not violate Constitution). The question of “primary effect” was no longer the key question for the Court in this case, but rather whether the state was responsible for religious indoctrination of students. See id. at 230 (noting that “placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination”). The Court refused to presume that public employees teaching secular subjects would be co-opted into participation in religious education. See id. at 211-12, 224 (stating guidelines for public employees teaching in parochial schools and no presumption that employees will inculcate religion in students). In 2000, the Supreme Court upheld a direct aid program that loaned educational materials, including books, computers, software and video players, to public and private schools, both religious and secular. See Mitchell v. Helms, 530 U.S. 793, 835 (2000) (holding that statute that allows state funds to be allocated for educational equipment that will be loaned to private schools does not violate the Establishment Clause). In upholding the federal-state cooperative program, Mitchell overruled several separationist era cases. See Government Partnerships, supra, at 23 (stating Mitchell’s effect on previous cases).

77. See Cole, supra note 12, at 562 (explaining views of current justices). Cole states that:

Four justices—Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—take a strict assimilationist view, approving of any aid to religion so long as it is administered in a formally neutral manner, while three Justices—Souter, Ginsburg, and Stevens—adopt a separationist stance, viewing most direct government support of religious activity as unconstitutional. Only Justices O’Connor and Breyer (and sometimes only O’Connor) have staked out the middle ground, where government support to religion pursuant to a neutral law of general applicability is sometimes but not invariably permissible.

Id. His article, however, was written prior to the Zelman decision. In Zelman, Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy and Thomas upheld the voucher program while Justices Souter, Stevens, Ginsburg and Breyer dissented.
shifted this divide in the direction of the assimilationists because this decision "represents the most recent and dramatic move away from Separationism." By a five-to-four vote, the Court declared that "independent choice' trumped 'no-aid separationism.'

Zelman, however, is just another part of the trend in Establishment Clause jurisprudence away from separationism. In the last two decades of the twentieth century, this trend has promoted:

[E]qual access for religious speech to public fora in which private speech is welcome; expansion of aid possibilities, both direct and indirect, so long as recipient institutions are defined in a religion-neutral way and the aid is given for a secular purpose; and an accelerating concern that government not speak in a religious voice. Thus, this trend has promoted religious pluralism, allowed religious institutions to play a more significant role in public programs and has prevented the government from both discriminating against religious views or having religious views of its own. This demise of separationism has prompted much scholarship on its history.


78. Lupu & Tuttle, supra note 21, at 919 (describing Zelman decision). The Zelman decision allows relationships between government spending and services offered by religious entities that were once thought to be forbidden. See id. (describing effect of Zelman decision).

79. Id. at 926 (describing effect of Zelman decision).

80. GOVERNMENT PARTNERSHIPS, supra note 76, at 22 (discussing Establishment Clause jurisprudence).

81. See id. (stating benefits of trends).

82. See Green, supra note 74, at 1117 ("The impending demise of separationism, and the concomitant ascension of neutrality, has been the subject of scholarly examination for several years."). Much of the scholarship recognizes that anti-Catholicism may have been the root of separationism. See GOVERNMENT PARTNERSHIPS, supra note 76, at 17 ("[A] number of scholars have argued that anti-Catholic sentiment—hardly unheard of in the U.S. in its first century and one-half—animated the separationist content reflected in the Everson opinions."); Salamanca, supra note 15, at 950-51 ("[M]ore than one responsible scholar has gently chided the early and mid-separationist Court for handing down decisions that reflect anti-[C]atholic animus... By the mid-1940s, fear of Roman Catholicism had become common among the intellectual elite in the United States.").

Professor Clarke E. Cochran argues that the metaphor of a wall of separation is misleading. See Clarke E. Cochran, Neutrality and Public Policy: Hidden Public Policy Traps in Mitchell v. Helms, in CHURCH-STATE RELATIONS IN CRISIS 225 (Stephen V. Monsma ed., 2002). Cochran writes:

My own preference is for the metaphor of a "border." Borders are places of separation. Honduras is not El Salvador; France is not Germany. Church is not (and should not be) state. The purpose behind the metaphor of separation is sound; some interactions between the institutions of religion and state harm both. Borders, however, do more than separate; they control movement, trade, and interaction. Borders are porous to a greater or lesser degree, which is half of their purpose. People and ideas
The Court's move away from separationism makes common and practical sense for the well-being of our society. One scholar states that "[i]nstead of trying to place walls of separation between public and private, and between church and state, only to breach or ignore them again and again, it would be more appropriate to determine how to allocate responsibilities in a world that mixes public and private."\(^8\) She continues by stating that "[s]ome form of shared responsibility, connecting governments with private groups (both religious and nonreligious) seems both most practical and most fitting."\(^8\) Government funding of faith-based services is part of this practical solution to our country's responsibilities to the less fortunate. Zelman and the judicial retreat from separationism seem to logically pave the constitutional way for some forms of funding for faith-based services.

and commerce must flow between nations if they are to remain healthy. Similarly, the territory of religion and public life is a rich and fascinating borderland. Both legitimate goods and contraband abound. Relationships are fluid; checkpoints shift.

\(\text{Id. at 226. This argument is far from what separationists believe. See }\)Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."). This, however, may not be what the Framers truly intended when they wrote the Establishment Clause of the First Amendment. See A. James Reichley, Religion in American Public Life 109 (1985) (explaining Madison's interpretation of First Amendment). For instance, James Madison believed that "Congress should not establish a religion, [ ] enforce the legal worship of it by law, nor compel men to worship God in any manner contrary to their own beliefs." \(\text{Id. in addition, Madison wanted to insert the word "national" into the amendment before the word "religion" so that it would be clear that only the establishment by the federal government was prohibited. See id. (stating Madison's idea of adding "national" to amendment, but antifederalists wanted no mention of word "national" in text). Actually, the competing and differing theories regarding the Establishment Clause may be due to the uncertainty regarding the Framers' intent. See Ashley M. Bell, Comment, "God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions, 50 Am. U. L. Rev. 1273, 1281 n.40 (citing Robert T. Miller & Ronald Flowers, Toward Benevolent Neutrality 241 (3d ed. 1987)).

Nevertheless, it is important to note that "separation of church and state" does not appear in the First Amendment. See Martha Minow, Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It, 49 Duke L.J. 493, 512 (1999) ("Despite its common use, the phrase 'separation of church and state' neither appears in the First Amendment nor adequately summarizes the complex case law implementing the ban against governmental establishment of religion and the guarantee of religious free exercise."). It is also important to note that Chief Justice Rehnquist, a strict constructionist, thinks that the original intention behind the Establishment Clause was to forbid Congress from designating a "national church" and from enacting laws favoring one religion over another. See Lewis D. Solomon & Matthew J. Vlissides, Jr., Faith-Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis, 10 Cornell J.L. & Pub. Pol'y 265, 287 (2001) (stating Chief Justice Rehnquist's view on Establishment Clause).

83. Minow, supra note 82, at 508.

84. Id. at 509. Nevertheless, Minow states that "no practical and coherent conception of social provision can proceed without facing the constraints imposed by the United States Constitution and its interpretation by the courts." \(\text{Id.}\)
B. The Zelman Decision in the Context of Faith-Based Services

The Zelman decision may create the only constitutionally acceptable framework for President Bush's faith-based service initiatives to be realized under the law. Although Zelman is based in the education context, its approval of indirect funding of services provided to religious entities extends to other social services. Neutrality and true private choice are the measure of constitutionality, rather than the specific service in question. Thus, with Zelman's focus on the choice of the beneficiary through a voucher system, a similar voucher system applied to social service programs would be an appropriate method for government funding of faith-based services.

Vouchers represent a form of the normally constitutional method of indirect aid. In Zelman, "the majority emphasized the traditional distinction between 'direct aid' and 'private choice' programs and stated that it

85. See Lupu & Tuttle, supra note 21, at 984 ("Given its approval of voucher programs that transfer funds from government to private religious organizations, Zelman represents the only constitutionally acceptable path for realizing the 'level playing field' the President seeks.").

86. See id. at 982 (stating that Zelman's approval of indirect funding to religious providers "extends seamlessly to other social services").

87. See id. (noting that "[f]ormal neutrality and 'true private choice' remain the measure of constitutionality"). Whether the program is schooling or welfare services, the type of service should not be a determinative factor of constitutionality. See Minow, supra note 82, at 556, (discussing challenge of connecting "public and private lives" with respect to education). Martha Minow argues that "[t]he injection of private religious options into the delivery of welfare services is perhaps less worrisome because food and shelter, job training, and drug treatment do not hold the place of civic and cultural meaning that schooling does." Id.

88. See Lupu & Tuttle, supra note 21, at 984 ("As applied to social service programs, the voucher device would permit government to finance beneficiaries who choose to obtain services at faith-based providers, so long as secular providers were among the available choices.").

89. See Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002) (discussing Supreme Court jurisprudence of direct and indirect aid programs). The majority in Zelman indicated that indirect aid programs have remained unequivocally constitutional:

[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals. While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

Id.
had consistently upheld those programs falling into the latter category.\textsuperscript{90} Therefore, the voucher method, which in its definition is based on choice, may be the best method for permitting faith-based services to receive government funding.\textsuperscript{91} Even prior to the \textit{Zelman} decision, one commentator wrote that the "intercession of private choice could well immunize such expenditures from an Establishment Clause challenge."\textsuperscript{92} Private choice through vouchers immunizes government programs from an Establishment Clause challenge because, arguably, the choice of whether the money goes to a religious provider or a secular provider is being made by the beneficiary and not by the public choice of the government.\textsuperscript{93}

Under true private choice programs, the religious nature does not come under constitutional attack. Government funding of religious entities based on beneficiary choice does not prevent faith-based service providers from maintaining their religious character.\textsuperscript{94} This facet of Establishment Clause jurisprudence is beneficial to faith-based services because much of their success is due to this religious character.\textsuperscript{95} Beyond

\begin{itemize}
\item \textsuperscript{91} See Lupu & Tuttle, \textit{supra} note 21, at 992 ("\textit{Zelman}... suggests that vouchers are indeed the path of least constitutional resistance for government partnerships with faith-intensive providers.").
\item \textsuperscript{92} Minow, \textit{supra} note 82, at 534. Although Minow makes this statement with respect to the early analysis of school vouchers, she elaborates on how the analysis can correlate to a voucher system for social services. \textit{See id.} at 534-35 (connecting vouchers for schooling to vouchers for social services). Minow explains:
\begin{itemize}
\item The child whose parents use a voucher to select a parochial school exercises a private choice and does not thereby produce a governmental endorsement of religion. Similarly, an individual recipient of a voucher for temporary financial assistance who elects to redeem it at a local church expresses a personal, not a governmental, choice. The individual could then choose a program that includes, for example, prayer as part of the contact with the participating nonpublic agency.
\end{itemize}
\begin{itemize}
\item \textit{Id.}
\item \textsuperscript{93} See Scott M. Michelman, \textit{Faith-Based Initiatives}, 39 HARV. J. ON LEGIS. 475, 485 (2002) ("If a federal or state government were to issue vouchers under the indirect aid provision, it could argue that it is the private choice of the beneficiaries, not the public choice of the government, that involves religious organizations in the government function.").
\item \textsuperscript{94} See \textit{Government Partnerships}, \textit{supra} note 76, at 25 ("Most significantly, the restriction on government support of specifically religious activities, such as worship or religious instruction, does not operate in the universe of beneficiary choice programs.").
\item \textsuperscript{95} For a discussion of the success of faith-based services due to their religious character, see \textit{infra} notes 142-46 and accompanying text. Charitable Choice legislation acknowledged that the religious character of faith-based services was key to its success. \textit{See White House Release}, \textit{supra} note 7, at Barriers to Faith-Based Organizations Seeking Federal Support (discussing impetus for Charitable Choice legislation). According to the White House, prior to Charitable Choice:
\begin{itemize}
\item [C]ommunity-serving religious groups seeking support often had to conceal, and sometimes even compromise, their distinct religious character—the very quality that sparked and sustained their success in
\end{itemize}
\end{itemize}

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allowing faith-based services to keep the faith in their services, the voucher regime ensures that the government is not putting service recipients in programs with a religious character; rather, the beneficiary is choosing whether the beneficiary wants to be placed in a program of that nature.\textsuperscript{96} Moreover, under federal law, when funding a faith-based social service, the government must provide an alternative secular service provider when the recipient objects to the religious character of the faith-based provider.\textsuperscript{97} Thus, the government is not directly supporting a religious organization. On the other hand, direct aid provides no "buffer" between the government and the religious organization, thereby raising constitutional questions.\textsuperscript{98} Despite the constitutional murkiness of direct aid programs, faith-based service providers and government administrators view them as more economically advantageous than vouchers.\textsuperscript{99}

Charitable Choice was written to respond point-by-point to various inappropriate restrictions by explicitly protecting religious charities from pressures to secularize their programs, abandon their religious character, or sacrifice their autonomy. \textit{Id.} Charitable Choice evenhandedly responded to these problems by allowing religious organizations to receive government grants for social services "without impairing the religious character of such organizations, \textit{and} without diminishing the religious freedom of beneficiaries of assistance funded under such program." 42 U.S.C. § 604a(b) (2003) (emphasis added).

\textsuperscript{96} See Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) ("The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.").

\textsuperscript{97} See 42 U.S.C. § 604a(e)(1) (describing rights of beneficiaries). The Code states:

\begin{quote}
If an individual . . . has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program . . . the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.
\end{quote}

\textit{Id.}

\textsuperscript{98} See Michelman, \textit{supra} note 93, at 485 ("Direct aid, by contrast, provides no buffer between the government and the religious organizations to which it delegates the social service function.").

\textsuperscript{99} See Lupu & Tuttle, \textit{supra} note 21, at 993 (stating that vouchers are not as economically sound as direct aid nor are they as effective at inducing faith-based organizations into performing services). Government administrators who want to induce new providers through Charitable Choice believe that vouchers do not have the "quick and large payoff" that government agencies want. \textit{See id.} (discussing government administrators' concerns regarding vouchers). Essentially, these administrators understand that "vouchers may be constitutionally secure," however, they also view them as "economically unpromising." \textit{Id.} (explaining perplexing situation of government administrators who understand that vouchers, unlike direct aid programs, are constitutionally sound but are not as economically sound as direct aid).

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Zelman does not necessarily answer the question whether its premise encompasses direct aid programs.\textsuperscript{100} Because the Zelman majority put a large emphasis on the Ohio school voucher program being an indirect aid program of true private choice, it could be inferred that if the program was one of direct aid or the choice was restricted to only religious schools, the Court would have more closely followed Establishment Clause precedent and would have struck down the program.\textsuperscript{101} Nevertheless, Zelman does not rule out direct aid programs as being potentially constitutional.\textsuperscript{102}

A direct aid program that involves funding to a wide range of service providers, both religious and secular, and allows the intended beneficiary to choose which provider to seek help from, may encompass many of the same principles used to uphold the Ohio school voucher program. Such a direct aid program may be considered constitutional and may actually fall within the category of indirect aid.\textsuperscript{103}

Thus, even if the government directly funds a religious entity, the program would be considered constitutional as long as the beneficiary has true private choice. For example, in Freedom from Religion Foundation v. McCallum, the Wisconsin Department of Correction entered a contract with Faith Works, a faith-based residential treatment center for substance abuse, to provide services for eligible offenders within the state's correctional system.\textsuperscript{104} The Department also had contracts with non-faith-based halfway houses; however, those programs were only thirty to ninety days long, whereas the Faith Works program was nine to twelve months long.\textsuperscript{105}

100. See Kathleen M. Sullivan, Public Values in an Era of Privatization: The New Religion and the Constitution, 116 Harv. L. Rev. 1397, 1420 (2003) (questioning whether direct government funding of religious service providers is constitutional if "government's funding criteria neutrally includes both religious and nonreligious recipients").

101. See Sara J. Crisafulli, Comment, Zelman v. Simmons-Harris: Is the Supreme Court's Last Word on School Voucher Programs Really the Last Word?, 71 Fordham L. Rev. 2227, 2270 (2003) ("[T]he Court focused on the indirect nature of the aid—that it was first sent to parents who then endorsed the check over to the school—to circumvent the need to look further at the Lemon criteria. Had the funds been sent directly from the State to the sectarian schools, or had the voucher program restricted participation to private religious schools, the Court would likely have followed its Establishment Clause precedent more closely.").

102. For a further discussion of the potential constitutionality of direct aid programs, see supra note 100 and accompanying text.

103. For a further discussion of the effect of private choice on the classification of a program as an indirect aid program, see infra notes 104-13, and accompanying text.


105. See McCallum, 214 F. Supp. 2d at 909 ("In addition to Faith Works, the Division of Community Corrections also contracts with the following non-faith-based halfway houses in the Milwaukee area: Horizon House, Independent Living Center, Interventions, Joshua Glover Halfway House, Thurgood Marshall House and The Bridge Halfway House. The programs these facilities offer are generally
Probation and parole agents referred the offenders to Faith Works.106 Because the Faith Works program included a religious component, the agents had to inform the offenders about its religious nature and that they did not have to participate if they did not want to.107

Using Zelman, the district court upheld the contract with Faith Works because the offenders who benefited from the program had an independent, private choice.108 The district court was able to use Zelman despite Faith Works receiving a contract and direct funding from Wisconsin because the court deemed it indirect aid “because the program does not receive payments of a set amount from the department but instead receives funding based on the number of offenders enrolled in the program.”109 The U.S. Court of Appeals for the Seventh Circuit affirmed this decision.110 When discussing how Zelman created the constitutional basis for upholding Wisconsin’s funding of Faith Works, Judge Richard Posner likened the case to Zelman:

The practice challenged in the present case is similar [to Ohio’s school voucher plan in Zelman]. The state in effect gives eligible offenders “vouchers” that they can use to purchase a place in a halfway house, whether the halfway house is “parochial” or secular. We have put “vouchers” in scare quotes because the state has dispensed with the intermediate step by which the recipient of the publicly funded private service hands his voucher to the service provider. But so far as the policy of the establishment clause is concerned, there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the

30-90 days in length, whereas the Faith Works program provides nine to twelve months of residential treatment.”.

106. See id. at 910 (“Not all offenders were eligible to enroll in Faith Works under the Non-traditional Opportunities for Work program, which requires that the individual have dependent children. Eligible Department of Corrections offenders who participated in Faith Works were referred to the program by probation and parole agents. Offenders are not given carte blanche to choose whatever program they desire or a sum certain that they can use for whatever treatment services they select.”).

107. See id. at 910 (stating that Department of Corrections agents were instructed repeatedly to tell offenders that Faith Works has religious component and offenders do not have to participate). While none of the offenders referred to Faith Works objected and there was no directive to offer a secular alternative, Susan Wundrow, a parole and probation agent, testified that if an offender objected, she would have talked to her supervisor about placing the offender in a non-faith-based halfway house. See id. (stating that offenders would not necessarily be offered secular alternative to Faith Works, although offender would be asked whether offender objected to referral).

108. See id. at 920 (“I find that offenders participate in the program as a result of their genuinely, independent, private choice.”).

109. Id. at 914.

110. See Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880, 884 (7th Cir. 2003) (concluding that it is misunderstanding to suppose that choice is not free when choices are not equally attractive to chooser).
service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers.\(^{111}\)

Government funding based on vouchers is thus more likely to be a program based on true private choice. Therefore, \textit{Zelman}, as applied in the \textit{McCallum} cases, truly makes vouchers "the path of least constitutional resistance for government partnerships with faith-intensive providers."\(^{112}\)

\textit{McCallum} shows that direct funding through grants or contracts may actually not fall within the constitutional murkiness of direct aid programs. If the program involves beneficiary choice, it is essentially a voucher system.\(^{113}\) The only difference is that the government money does not go to the beneficiary first. The beneficiary simply instructs the government where to send it. To say that there is a major constitutional difference between these two different ways to use vouchers is to create a technicality for the sole purpose of thwarting the government's attempt to fund faith-based services and thus preventing help for those in dire need of these services. Irrespective of how the money is channeled from the government to the faith-based service, the constitutionality of the program depends on the availability of choice for the program's beneficiaries.

C. \textit{Concerns About Choice}

For programs to be based on "choice," there must be a variety of religious and secular providers for the beneficiary to choose from, and the choice must be "real" so that beneficiaries are not pressured into a religious setting as an unwanted consequence of their need for public assistance.\(^{114}\) Thus, one of the major criticisms of voucher programs is that the requisite availability and freedom of choice are not met.\(^{115}\) In \textit{Zelman}, Justice Souter in dissent attacked the legitimacy of the choice available in Ohio's school voucher program.\(^{116}\) He stated that the majority was "confusing" the question of choice by including all alternative educational options such as community or magnet schools into its analysis.\(^{117}\) Also, since

\(^{111}\) \textit{Id.} at 882.

\(^{112}\) Lupu & Tuttle, \textit{supra} note 21, at 992.

\(^{113}\) \textit{See McCallum,} 324 F.3d at 882 (explaining that process of funding Faith Works including beneficiary choice is essentially voucher system).


\(^{115}\) \textit{See} Minow, \textit{supra} note 82, at 535 (stating that individual choice requires both sufficient autonomy to choose and sufficient options for choice to be meaningful).


\(^{117}\) \textit{See id.} at 698-99 (explaining majority's misapplication of choice requirement). Justice Souter explains his problem with the majority's construction of the choice requirement by stating:
there was a tuition cap, he was concerned that choice was being negatively effected by the fact that Catholic schools cost less than secular private schools. 118 Private schools would have to subsidize more of the cost above the cap than the Catholic schools, thus discouraging private schools from participating in the program. 119 In turn, this limits the number of non-religious schools from which a parent can choose. 120 Therefore, Justice Souter’s view on whether there was true private choice was much different from the majority’s view. 121

Despite Establishment Clause jurisprudence moving away from separationism, the government should still be ready to fight over whether a program funding a religious entity actually gives the beneficiaries a true private choice. 122 Some may argue that true private choice exists only

The majority’s view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

Id. at 699.

118. See id. at 704-05 (“[T]he $2,500 cap that the program places on tuition for participating low-income pupils has the effect of curtailing the participation of nonreligious schools: ‘nonreligious schools with higher tuition (about $4,000) stated that they could afford to accommodate just a few voucher students.’ By comparison, the average tuition at participating Catholic schools in Cleveland in 1999-2000 was $1,592, almost $1,000 below the cap.”).

119. See Sullivan, supra note 100, at 1416 n.64 (explaining that Justice Souter’s conclusion that there is no “genuinely free choice” derives from voucher monetary amount covering parish-subsidized Catholic school tuition, but voucher amount does not cover tuition for most private schools).

120. See Fenton, supra note 90, at 668 (“Although participants in the Cleveland program decide which schools receive their aid, the majority failed to resolve the situation presented here, where the initial pool from which those participants can choose is arguably limited by the program’s tuition cap.”).

121. See Zelman, 536 U.S. at 707 (Souter, J., dissenting) (discussing divergence of views between majority and dissent). Justice Souter stated that “there is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students.” Id. On the other hand, Chief Justice Rehnquist, for the majority, stated that, with respect to choice, “[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.” Id. at 658.

122. See Minow, supra note 82, at 535 (discussing concerns about choice being genuine). Martha Minow gives an example of how choice can be attacked under a
government funded faith-based service because of the beneficiary's ability or lack of ability to make a choice due to duress or condition. See id. (expressing concern for beneficiary potentially not having true autonomy to choose). She states that:

The sheer fact that the arena involves subsistence (as well as day care, substance abuse treatment, and other services crucial to daily survival) renders questionable the assertion that recipients are freely and autonomously choosing. Autonomous choice is in jeopardy when the individual has no money, food, or housing and is offered these necessities on conditions that she might quickly refuse under other circumstances. Consider a single mother who left home with her two preschool children out of fear of domestic violence. Upon arriving at the local church that has the city contract for providing temporary assistance, she may be too afraid to object to the religious character of the services. "Choosing" a religious provider under these circumstances may reflect the kind of duress that calls into question the volition involved. Rather than an individual choosing, we would have a government manipulating and burdening the choice of the individual. Especially if the alternative is farther away, less visible, or less convenient, a voucher recipient may end up with a pervasively religious provider of a particular denomination, despite a desire to receive help elsewhere. Faced with the power of a caseworker to deny eligibility for the voucher in the first place, a destitute and desperate person may be quite reluctant to voice concerns about the location and identity of the service provider.

Id.

The objections to faith-based services are not just limited to the issue of choice. For example, the libertarian think-tank, the Cato Institution, published a report on how government funding will corrupt faith-based charities. See generally Michael Tanner, Corrupting Charity: Why Government Should Not Fund Faith-Based Charities, CATO Institute Briefing Papers (Mar. 22, 2001), at http://www.cato.org/pubs/briefs/bp62.pdf. Because of regulations required by government funding, "[c]harities attempting to meet all the grant conditions can find themselves completely redesigning their programs. As a result, programs that were once very successful can become unrecognizable." Id. at 10. Essentially, Tanner is concerned that mixing government with charity could undermine the reasons why faith-based services are effective in the first place. See id. at 1 (stating that government funding of faith-based services contains risks that might hinder effectiveness). His argument, however, does not recognize that Charitable Choice and Bush’s Faith-Based Initiatives are trying to get faith-based services government funding without them sacrificing their religious character. See generally White House Release, supra note 7, at Barriers to Faith-Based Organizations Seeking Federal Support (discussing barriers to federal support of faith-based services). Moreover, a survey of government funded faith-based programs in fifteen states found that: (1) 93% of the faith-based services stated that their experience with the government was "very" or "somewhat" positive, and 92% said they would contract with the government again; (2) less than 6% agreed with the common fear expressed above that public money would compromise their religiosity, displace private funds or limit their ability to be critical of the government; and (3) the most common complaint was the "burdensomeness of government reporting requirements" with 29% of service providers calling them a "considerable" or a "great" burden. See John C. Green & Amy L. Sherman, Fruitful Collaborations: A Survey of Government-Funded Faith-Based Programs in 15 States, 4-5 (Hudson Inst., 2002), available at http://www.hudsonfaithincommunities.org/articles/fruitful_collab.pdf (last visited Nov. 21, 2003) (listing findings of survey).

Another concern is with privatization (which includes Bush’s faith-based initiatives) in general because it can lead to less control and review of these groups. See Minow, supra note 4, at 1235 (explaining criticism of privatization). "Privatization can undermine a value as basic as guarding against the misuse of public
when there is a level playing field of all options, both secular and religious, and the religious and secular choices are of the same quality and price. Judge Posner in *McCallum* gave the best argument against this construction of the meaning of true private choice, stating that it would be “a misunderstanding of freedom . . . to suppose that choice is not free when the objects between which the chooser must choose are not equally attractive to him.” Using a simplistic example, Judge Posner proposed that if you could only choose between chocolate and vanilla ice cream and you said vanilla because it was “the only honest answer” you could give, it cannot be said that you did not exercise free will or you “had no choice” when you chose vanilla.

D. *The Effectiveness of Faith*

Faith-based services provide valuable social services in poverty-stricken areas of our country, and the services’ religious values facilitate their effectiveness. If there is no regulation, these groups can avoid otherwise applicable obligations and reporting requirements to the public. See id. (explaining how lack of regulation may lead to lack of accountability to public). The object, however, of Charitable Choice and Bush’s faith-based service initiatives is not to get rid of all regulation, but just the regulation that unnecessarily impedes the services’ religious quality. See White House Release, supra note 7, at Barriers to Faith-Based Organizations Seeking Federal Support (discussing burdensome restrictions on faith-based services to receive government funding). This lessening of restrictions is not taking away from core requirements of accountability, but rather from ridiculous requirements placed on faith-based services to try and acquire funding. An example of the overburdensome demands of government on faith-based services is that the “U.S. Department of Housing and Urban Development wrote to the Catholic archbishop of Los Angeles concerning federal aid received by his St. Vincent de Paul Shelter for the homeless. HUD asked whether it would be possible to rename it the ‘Mr. Vincent de Paul Shelter.’” George F. Will, *Keeping Faith Behind Initiatives*, WASH. POST, Feb. 4, 2001, at B7; see also Tanner, supra, at 3 (commenting how in this incident federal government was “almost comic in [its] extremism”).

123. The plaintiffs in *McCallum* tried to argue that because Faith Works provided a longer and better quality treatment program, the offenders did not have a real choice. See Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880, 883-84 (7th Cir. 2003). Their argument was that the offenders had to choose Faith Works because their other choices were inferior and thus not real choices. See id. at 884 (stating that plaintiffs tried to argue that offenders had no real choice). In response to this argument, Judge Posner said that “quality cannot be coercion.” Id. He stated that Faith Works would essentially be penalized because its secular competitors cannot or will not invest as much as Faith Works does into providing a quality service. See id. (noting negative effect on Faith Works for being effective and quality program). This would have the perverse incentive of having programs reduce quality to get government funding, thus creating “a race to the bottom.” Id.

124. Id.

125. See id. (“It would mean that a person was not exercising his free will when in response to the question whether he preferred vanilla or chocolate ice cream he said vanilla, because it was the only honest answer that he could have given and therefore ‘he had no choice.’”).
tiveness. While there is no "smoking gun" proof that faith-based services are more effective than government social services, there is proof of their effectiveness in general, and there is no proof that they are less effective. Additionally, many faith-based services provide services such as love and companionship that are hard to quantitatively measure in terms of success. Despite faith-based services being in "constitutionally unmarked territory," the country has an obligation to do what is best for social policy. Thus, broadening the range of providers and increasing

126. See Cole, supra note 12, at 567 (arguing that religious institutions are often situated in, and provide social services to, poverty-stricken areas). Criminologists who analyze the ability of community-based organizations have found that organizations based in the community are more effective than outside organizations in reducing criminal behavior. See id. (noting conclusion of criminologists). Organizations "that reinforce community ties are especially effective" in the fight against crime. Id. at 568. These community groups need not be religious to be effective; however, religious groups are the primary provider of services in many inner city neighborhoods. See id. (stating that religious entities are sometimes only viable source in inner cities). Cole further showed how the religious values that are at the heart of faith services contribute to the effectiveness in poverty-stricken communities. See id. at 569 (arguing that religious values and commitments contribute to effective provision of social services). Religious communities, at their core, are deeply committed to respecting all human beings and believing that all humans deserve forgiveness and redemption. See id. (describing religion's commitment to humankind). While none of these moral beliefs are exclusively religious, moral teaching is more "comfortably situated" in the religious sphere than in the government or secular sphere. See id. (stating that these commitments and morals in general have place in secular society, but are better suited in religion). Cole concludes that "[g]overnment support of faith-based institutions offers the possibility of reinforcing these values through society." Id.

127. See id. at 576 ("Although no empirical research proves that faith-based programs are better than secular programs, certainly none prove that they are worse."). The Bush Administration believes that private administration of social programs in general, both religious and secular, is inherently superior to government administration. See Diller, supra note 10, at 1757 (stating Bush Administration's opinion). Also, critics of the effectiveness of faith-based services or those who desire to leave the job of social welfare to the government bureaucracy, should recognize that "the Federal Government routinely awards billions in taxpayer support to organizations whose own efficiency and cost-effectiveness have not been validated by careful studies." White House Release, supra note 7, at Barriers: A Federal System Inhospitable to Faith-Based and Community Organizations. The Bush Administration has emphasized that there is a need for studying the effectiveness of all programs the government funds. See id. (indicating across-the-board emphasis on efficiency of government funded programs).

128. See Robert Wuthnow et al., The Effectiveness and Trustworthiness of Faith-Based and Other Service Organizations: A Study of Recipients' Perceptions, at http://www.religionandsocialpolicy.org/docs/events/2003_spring_research_conference/wuthnow.pdf (last visited Nov. 23, 2003) (stating leading argument of nonprofit organizations is that services they provided cannot be easily or economically measured).

129. See Sullivan, supra note 100, at 1420 (agreeing with Martha Minow's advice that government funding of faith-based services is approached "with a practical eye on the best social policy").
their funding provides nothing but beneficial aspects to children in poor schools, drug addicted persons and the working poor. 130

Studies show evidence of faith-based services' success. For example, a Princeton University study showed that recipients of faith-based services view them as effective and trustworthy; however, the study showed little support for the proposition that faith-based services are more effective than secular service providers. 131 With respect to prison rehabilitation, a study of New York prisons showed that prisoners who participated in the Prison Fellowship Bible studies program and took part in only ten classes had a much lower rate of recidivism. 132 Only fourteen percent of the participants "were rearrested within a year of their release, while among the matched group of those who had not taken part, forty-one percent were rearrested." 133 The Prison Fellowship program is also in Texas, and of the eighty prisoners who participated so far, only five percent have returned to prison. 134 With respect to substance abuse rehabilitation, a Christian drug treatment center called Teen Challenge was found to be "much more effective than its secular counterpart." 135 Teen Challenge had a ninety-five percent success rate with heroin addicts and an eighty-three percent success rate with alcoholics—numbers that are far higher than secular drug rehabilitation programs. 136 Alcoholics Anonymous is a well-known example of a treatment program that incorporates faith into its process, although it is nondenominational. 137 With respect to crime, a 1995 review

130. See id. ("From the point of view of children facing limited educational options and adults in dire need, broadening the array of educators and health and welfare providers to include religious organizations, subject to public conditions, had much to recommend it.").

131. See Wuthnow et al., supra note 128 ("[M]ean effectiveness and trustworthiness scores are relatively high for FBOs . . . . On the other hand, there is little support in these results for the hypothesis that FBOs may be more effective than NSOs, at least not in terms of how they are perceived by recipients.").


133. Id.

134. See id. (discussing success of similar prison bible program in Texas).

135. Id.

136. See Cole, supra note 12, at 574-75 (highlighting statistics for Teen Challenge's success and how they are higher than secular programs).

137. See id. at 572 ("Alcoholics Anonymous, for example, a particularly successful faith-based treatment program, is emphatically independent, radically decentralized, religious (although nondenominational), and committed to community."). Cole further explains how the twelve-step program requires its participants to look toward a "higher power" to cure their alcoholism. See id. (explaining religious power behind twelve-step program). Unlike secular groups, this commitment to a higher power creates an important bond among the participants, which encourages their cure. See id. (stating how seeking higher power makes program different than secular groups). Cole does note that half of the initial attendees of Alcoholics Anonymous drop out after two months and 90% leave within a year. See id. at 575 (discussing negative statistics on Alcoholics Anonymous). He also cites an eight-year study by the National Institute of Alcoholism and Alcohol
of criminology literature determined that “religious influences discourage crime and delinquency.” 138 A 2001 study found that religious involvement reduced the number of youth-committed serious crimes in high crime areas. 139 A more specific example of the effectiveness of faith is the Ten Point Coalition in Boston. 140 This group of clergy played an essential role in helping decrease Boston's homicide rate eighty percent from 1990 to 1999. 141 Therefore, there is some quantitative evidence of the success of faith-based services.

The reason for much of this success can be equated to the religious nature and values of the programs. One scholar argues that “[t]he concepts of forgiveness, mercy and redemption are at the core of many faiths.” 142 This element of compassion in faith-based services is missing from the bureaucratic lethargy of government services. 143 Supporters of Abuse that found no discernible difference in the Alcoholics Anonymous program and secular alternatives. See id. at 575-76 (noting findings of study on Alcoholics Anonymous in comparison to secular programs).


139. See generally Byron R. Johnson, The Role of African-American Churches in Reducing Crime Among Black Youths, at http://www.manhattan-institute.org/html/crruces2001_2.htm (last visited Nov. 23, 2003). Johnson described the results: (1) the effects of neighborhood disorder on crime among black youth are partly mediated by an individual’s religious involvement; and (2) involvement of African-American youth in religious institutions significantly buffers or interacts with the effects of neighborhood disorder on crime, and in particular, serious crime.

Id. While Johnson indicates that “much more research” is needed, his study demonstrates that African-American churches “should no longer be overlooked or [considered] ‘invisible institutions’ among criminologists.” Id.

140. See Cole, supra note 12, at 568 (illustrating Ten Point Coalition’s story and success in Boston’s fight against crime). After a shootout and stabbing during a funeral service in 1992, members of the African-American clergy formed this group. See id. (describing brutal violence at funeral and how it sparked foundation of Ten Point Coalition). Despite being critics of some police tactics, the clergy began working with the police to thwart gang violence by engaging in street ministry and reaching out to troubled youths. See id. (listing ways Ten Point Coalition helped effort to subdue gang violence). The group also helped the police identify the youths who were most responsible for the problems and advocated for harsh punishments in some circumstances and leniency in others. See id. (explaining how clergy helped Boston police). From David Cole’s description, one can see the tremendous effort exuded by these clergymen.

141. See id. (“Boston’s homicide rate plummeted, falling 80% from 1990 to 1999, and the police and scholars have both acknowledged the critical role of the Ten Point Coalition in that success story.”).

142. Id. at 570.

143. See Minow, supra note 82, at 530-31 (“[T]he provision of care for the most vulnerable should not be passed through the cold bureaucratic indifference of state-sponsored programs, but instead by means of face-to-face exchanges with a moral community. Ideally, the provision of care by religious groups adds moral dimensions of expected responsibility and hope, and it facilitates relationships within which people can feel the pressure to change.”). John Dilulio (former head of Bush’s Faith-Based Initiatives) believes that, with respect to children in need of
faith-based services and opponents of government social services argue that the government causes dependency, while the working of faith can help move people away from dependency, whether it be financial, drug or another form of dependency.144 Also, because faith-based services are connected to a faith, their employees may view their job as a mission rather than simply a means of getting a paycheck.145 Therefore, aside from the constitutional debates discussed in the previous sections, there are statistics and solid arguments for the effectiveness of faith.146

IV. CONCLUSION

In conclusion, Zelman's approval of school vouchers where there is true private choice creates a constitutional framework for government funding of faith-based services.147 With a voucher system for faith-based services, the beneficiary would choose from an array of secular and religious providers and the government would not be directly choosing a religious provider. President Bush's faith-based service initiatives can be achieved through the constitutional framework of vouchers and beneficiary choice. Regardless of one's faith or party affiliation, all Americans should desire the success of this program. With poverty and other social ills still plaguing our country, new and effective governmental means to end these struggles must be adopted.148 As Michael Harrington stated in The Other America, his famous book about poverty in the United States, "[t]he means are at hand to fulfill the age-old dream: poverty can now be social services, they "do not so much need services but instead caring adults in their lives." Id. at 531.

144. See id. (presenting argument that government fails to move people off dependency while religious organizations provide care, attention and model of independence).

145. See Cole, supra note 12, at 571 ("[T]he notion that work for others is a central part of one's religious identity may contribute to the spirit in which the work is done; employees of religious entities may be less likely than employees of secular organizations and government agencies to treat their work as just a job."); Minow, supra note 4, at 1239 ("The staff and volunteers are often acting out of religious conviction and pursuing practices guided by religious teachings.").

146. See generally Cole, supra note 12, at 566-78 (explaining case for supporting faith-based services). Also, it must be noted that there is no evidence that faith-based programs perform worse than the government and other secular programs, and there are many anecdotal success stories of those who believe the power of faith helped their desperate condition. See id. at 576 ("Although no empirical research proves that faith-based programs are better than secular programs, certainly none proves that they are worse. And it is difficult to dismiss the many testimonials of those who believe they have been helped through religious intervention.").

147. See Lupu & Tuttle, supra note 21, at 984 (stating Zelman is constitutional path for funding of faith-based services).

148. Poverty rose and income levels declined in 2002 for the second straight year. See Lynette Clemenson, More Americans in Poverty in 2002, Census Study Says, N.Y. TIMES, Sept. 26, 2003, at A1 (stating results from census study). The official poverty rate is 12.1% and the total number of people living below the poverty line is 34.6 million. See id. (noting exact numbers concerning poverty rate and percentage of people living in poverty).
abolished."\textsuperscript{149} Government funding of the great works of faith-based services is one of those new and effective means to fulfill this dream.

\textit{Craig A. Newell, Jr.}

\footnotesize

\textsuperscript{149} \textsc{Michael Harrington}, \textit{The Other America} 174 (Touchstone 1997) (1962).